

Contracts
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Contract Formation

I. Foundations

A. **Mutual Assent:** Each party to a contract manifests its assent to the contract by making a promise or by beginning or tendering performance, and each party's promise or performance must relate to the other party's. R2 §§ 18 & 23.

B. **“Bilateral” vs. “Unilateral” Contracts**

1. **Bilateral Contract:** each party makes a promise in exchange for the promise made by the other.
2. **Unilateral Contract:** one party makes a promise in exchange for specified performance by the other.

C. **“Objective” vs. “Subjective” Assent**

1. As a general rule, we judge contract formation (as well as contract terms) by the objective manifestations of the parties' intent – what they said and what they did – not by their hidden, subjective intent.
2. However, if
 - a. one party subjectively believed that the parties did or did not form a contract,
 - b. the other party knew or had reason to know at the time the contract was allegedly formed of the first party's subjective belief, and
 - c. the first party did not know or have reason to know at the time the contract was allegedly formed that the other party did not share his subjective belief,

then the parties' assent will be judged based on the subjective intent of the first party, because it was known to both parties at the time the alleged contract was formed. *See* R2 § 20(2).

II. Offer

- A. **What is an “Offer”?:** An offer is the offeror’s “manifestation of ... willingness to enter into a bargain, so made as to justify [the offeree] in understanding that his assent to that bargain is invited and will conclude [the bargain].” R2 § 24.
- ◆ **CISG Art. 14(1):** “A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.”
- B. **Who Has the Power to Accept?**
1. **General Rule:** The offeror’s manifested intent determines who may accept the offer. R2 § 29(1).
 2. The offeror may give the power to accept to:
 - a. a **specified person**, or
 - b. one or more members of a **specified group or class** of persons, or
 - c. anyone or everyone who makes a specified promise or renders a specified performance. R2 § 29(2).
- ◆ **CISG Art. 14(2):** “A proposal other than one addressed to one or more specific persons is ... merely an invitation to make offers,” unless the person making the proposal clearly indicates otherwise.
- C. **“Offer” vs. “Preliminary Negotiations”:** A manifestation is not an offer “if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until [the offeror] has made a further manifestation of assent.” R2 § 26.
- ◆ **“Offer” vs. “Invitation to Offer”:** Most advertisements, as well as requests for proposals and invitations to bid, are not offers that the recipient can accept and thereby form a contract; rather, they are invitations to recipients to make an offer that the party issuing the invitation may choose to accept and thereby form a contract.
- D. **Requirement of “Certainty”:** a purported offer cannot be accepted to form a contract unless the terms of the offer “provide a basis for determining the existence of a breach and for giving an appropriate remedy.” R2 § 33(1)-(2).
- E. **Effect of “Open” Term(s):** the existence of one or more open or uncertain terms may evidence that the purported offer is only preliminary. R2 § 33(3).

- III. **Terminating the Offer:** An offeree's power to accept an outstanding offer may be terminated by
- A. **Rejection:** An offeree's rejection of the offer terminates her power to accept, unless the offer specifically provides otherwise. R2 §§ 36(1)(a) & 38(1).
- ◆ An offeree who "manifests an intention not to accept" will be deemed to have rejected the offer unless the offeree may take the offer "under further advisement." R2 § 38(2)
- B. **Counteroffer:** A counteroffer proposes a substitute bargain differing from that in the original offer; an offeree who makes a counteroffer *forfeits the power to accept* the original offer unless the offeror or offeree clearly manifests a contrary intent. R2 §§ 36(1)(a) & 39.
- ◆ A rejection or counteroffer terminates the offeree's power of acceptance at the time the rejection or counteroffer is communicated to the offeror; provided that, if the rejection or counteroffer is communicated by mail or telegram (or, presumably, fax or e-mail):
 - (1) the offeree's power to accept terminates when the offeror receives the rejection or counteroffer; unless
 - (2) the offeree communicates and the offeror receives an acceptance prior to the time the offeror receives the (earlier-sent) rejection or counteroffer. R2 § 40.
- C. **Revocation by the Offeror:** Unless the offer states otherwise, the offeror may revoke an offer at any time before the offeree accepts the offer. R2 § 36(1)(c).
- ◆ A revocation is only effective when "actually communicated" to the offeree or when the offeree "acquires reliable information" that the offeror has taken actions evidencing an intent to revoke the offer. R2 § 42-43.
- D. **Lapse of Time:** If the offer contains a time of acceptance provision, the offeree's failure to accept before or by that time terminates his power of acceptance; otherwise, an offer terminates if not accepted within a "reasonable" period of time. R2 §§ 36(1)(b) & 41.
- E. **Death or Incapacity:** Unless the terms of the offer state otherwise, an offer is personal; and, therefore, is terminated by the death or incapacity of either the offeror or offeree. R2 §§ 36(1)(d) & 48.
- F. **Failure of a Condition:** An offeree's power to accept may terminate due to the non-occurrence of any condition of acceptance required by the terms of the offer. R2 § 36(2).

IV. Preserving the Offer

- A. **General Rule:** An offeror may revoke at any time before the offeree accepts.
- B. **R2 § 87:** An option is binding – *i.e.*, irrevocable per the terms of the option – if it
1. is in **writing**, is **signed** by the offeror, recites a purported **consideration**, and proposes an **exchange** on fair terms within a reasonable time, or
 2. is made irrevocable by **statute** (*e.g.*, UCC § 2-205), or
 3. would be **unjust** not to enforce the option, due to reasonably foreseeable **detrimental reliance** by the party to whom the option was offered.
- C. **Special Case: Merchants' Firm Offers to Sell or Buy Goods**
1. **UCC § 2-205:** A merchant who makes an offer
 - a. in a **signed writing**,
 - b. giving **assurances it will be held open** for a fixed period or for an indefinite period,
 - c. **cannot revoke** the offer, despite the lack of separate consideration,
 - d. for the period stated or, if no period is stated, for a reasonable time, but in no event more than 3 months.
 2. At the end of the period stated or reasonable time (but in neither case more than 3 months), the firm offer becomes a revocable offer.
 3. The 3-month limit does not apply to otherwise-binding option contracts for which the offeree gives separate consideration.
 4. **Not-So-Firm Offers Under the CISG**
 - a. Any offer may be revoked as long as the revocation reaches the offeree before she accepts, Art. 16(1), unless
 - b. the offer indicates it is irrevocable by “stating a fixed time for acceptance or otherwise,” Art. 16(2)(a), or
 - c. it was reasonable for the offeree to rely on the offer being irrevocable and the offeree has acted in reliance on the offer, Art. 16(2)(b); but

- d. an offeror may withdraw an irrevocable offer if its withdrawal reaches the offeree prior to or at the same time as the offer, Art. 15(2); and
 - e. in any event, an offer (irrevocable or not) terminates when the offeree's rejection reaches the offeror, Art. 17.
- V. **Acceptance:** the offeree's assent to the terms of the offer, demonstrated "in a manner invited or required by the offer." R2 § 50(1).
- A. **Means of Acceptance:** Unless the offer states otherwise, the offeree may accept by either
 - 1. **Performance**, R2 § 50(2); or
 - 2. **Promise**, R2 § 50(3).
 - B. **Necessity of Compliance (The "Mirror Image" Rule)**
 - 1. The offeree's acceptance "must comply with the requirements of the offer as to the promise to be made or the performance to be rendered." R2 § 58.
 - 2. A reply to an offer that purports to accept it, but on terms additional to or different from those offered, is a counteroffer, not an acceptance. R2 § 59.
 - C. **"Time, Place, and Manner":** If an offer prescribes the time, place, or manner of acceptance, the offeree must strictly comply with those requirements to create a contract; otherwise, acceptance may be made by any reasonable means, at any reasonable place, within a reasonable period of time. R2 § 60.
 - D. **When Does an Acceptance Take Effect?:** Unless the offer states otherwise, an acceptance that satisfies the offer's "procedural" requirements is effective as soon as the offeree communicates it to the offeror – even if the offeror has not yet received the offeree's communication, R2 § 63(a); unless
 - 1. the offeree purports to accept an **option contract**, in which case the acceptance does not take effect until the offeror receives it (again, unless the offer states otherwise), R2 § 63(b); or
 - 2. the offeree **previously dispatched a counteroffer or rejection**, in which case the acceptance takes effect only when the offeror receives it and only if the offeror receives it before receiving the earlier-dispatched counteroffer or rejection, R2 § 40.
 - ◆ The CISG allows an offeree to *withdraw* its acceptance as long as the withdrawal reaches the offeror no later than the acceptance. Art. 22.

VI. Special Case: Acceptance by Performance

A. **Notice of Acceptance:** While an offer for a unilateral contract can generally be accepted by merely performing the act requested, *see* R2 § 54(1), if the offeree

1. *may choose* between accepting by promise and accepting by performance,
2. *elects* to accept by performance, and
3. has reason to know that the offeror has *no adequate means* of learning of her performance with reasonable promptness and certainty,

then the offeror's obligation will be discharged unless

4. the offeree exercises *reasonable diligence* to notify the offeror of her performance;
5. the offeror *otherwise learns* of the performance within a reasonable time; or
6. the offer itself indicates that *no notification* of the offeree's performance is required. R2 § 54(2).

B. Commencement or Tender of Performance

1. **Pre-Restatement Common Law Rule:** An offer for a unilateral contract is not accepted until the act requested is fully performed (*i.e.*, the "Brooklyn Bridge" hypo).
2. **R2 § 45**, by contrast, provides that
 - a. where an offer invites an offeree to accept by rendering a performance *and does not invite a promissory acceptance*, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it; and
 - b. the offeror's duty ... under any option contract so created is conditional on completion *or tender* of the invited performance *in accordance with the terms of the offer*.
3. **Manifestations of Contrary Intent:** Official comment b provides that § 45 will not aid an offeree if the terms of the offer manifest the offeror's intent to reserve the right to revoke after the offeree begins to perform.
4. **Tender of Performance:** If A can perform the contract proposed by B without any assistance or cooperation from B, then once A tenders the required performance to B, B can no longer revoke the offer.

5. Beginning to Perform

- a. If the performance contemplated by the offer must occur over a period of time, once the offeree begins to perform, the offeror can no longer freely revoke the offer.
- b. However, the offeror is not bound to perform her part of the bargain unless the offeree **completes** the requested performance, unless the offeree's failure to complete is due to the offeror preventing, waiving, or repudiating the offeree's full performance.
- c. In any case, the offeree must **actually begin** to perform. Merely preparing to perform will not prevent the offeror from revoking.

VII. **Special Case: Acceptance by Silence:** As a rule, the law does not consider an offeree's mere silence or inaction as constituting an acceptance *that is binding against the offeree*; however, mere silence or inaction may constitute acceptance if:

- A. "[T]he offeror has stated or given the offeree **reason to understand that assent may be manifested by silence or inaction**, and the offeree in remaining silent and inactive **intends to accept** the offer," R2 § 69(1)(b);
- B. "[B]ecause of **previous dealings** or otherwise, it is **reasonable that the offeree should notify the offeror** if he **does not intend** to accept," R2 § 69(1)(c); or
- C. "[A]n offeree **takes the benefit of offered services with reasonable opportunity to reject them** and reason to know they were offered with the expectation of compensation," R2 § 69(1)(a).

VIII. Special Case: Goods Contracts

- A. There are five notable differences between the offer and acceptance rules of the common law and those of the UCC or CISG.
 1. **Open Terms:** At common law, one or more open or uncertain terms may evidence that the purported offer is only preliminary. By comparison,
 - a. **UCC § 2-204(3):** Even if one or more terms are left open a contract for sale or lease does not fail for indefiniteness if the parties have **intended to make a contract** and there is a **reasonably certain basis** for giving an appropriate remedy.
 - b. **CISG Art. 14(1):** An offer "is sufficiently definite if it indicates the goods and expressly or impliedly fixes or makes provision for determining the quantity and price."

2. **Effect of Late Acceptance:** At common law, an offeree must accept within the time stated in, or by the deadline set by, the offer; failure to do so constitutes a constructive rejection and terminates the offeree's power to accept. By comparison,
 - ◆ **CISG Art. 21(2):** If a writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it *would have reached the offeror in due time*, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.
3. **Manner of Acceptance:** If an offer governed by common law prescribes the time, place, or manner of acceptance, the offeree must strictly comply with those requirements to create a contract; otherwise, acceptance may be made by any reasonable means. R2 § 60. By comparison,
 - a. **UCC § 2-206(1)(a):** Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a contract shall be construed as inviting acceptance *in any manner and by any medium* reasonable in the circumstances.
 - b. **CISG Art. 18(1) & (2):** A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance, provided the statement reaches the offeror or the offeror becomes aware of the conduct within the time the offeror has fixed, or within a reasonable time if the offeror has not fixed a time.
4. **The “Mirror Image” Rule:** At common law, if the offeree's acceptance varies the terms of the offer in any way, or purports to accept the offer in a manner not allowed by the terms of the offer, the purported acceptance is treated as a counteroffer. By comparison,
 - a. **UCC § 2-207(1):** “A definite and seasonable expression of acceptance ... which is sent within a reasonable time operates as an acceptance *even though it states terms additional to or different from those offered ...*, unless acceptance is made expressly conditional on assent to the additional or different terms.”
 - b. **CISG Art. 19(2):** “[A] reply to an offer which purports to be an acceptance but contains *additional or different terms which do not materially alter* the terms of the offer *constitutes an acceptance*, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect.”

5. **The “Last Shot” Rule:** At common law, because a purported acceptance that included additional or different terms is treated as a counteroffer, parties can continue to exchange non-agreeing forms indefinitely. Once the parties perform the contract, the terms of the last form sent are deemed accepted by the party who first performed without sending a contrary form. By comparison,
 - a. **UCC § 2-207** dispenses with the “last shot” rule completely.
 - b. **CISG Art. 19** does so only when there is no material alteration. If the purported acceptance materially alters the offer, the CISG deems it to be a counteroffer.

B. The Article 2 “Battle of the Forms”

1. **“Additional” Term:** A term in a purported acceptance that neither contradicts a term in the offer nor materially alters the contract as a whole.
2. **“Different” Term:** A term in a purported acceptance that contradicts a term in the offer or that, while not contradicting a term in the offer, “materially alters” the contract as a whole. *See* UCC § 2-207 cmts. 4 & 5.
3. **How Does it Work?:** See the flow chart
4. **“Knockout Rule”** – Different terms are “knocked out” and replaced by UCC gap fillers.

C. Battaglia delle Forme Under the CISG

1. A reply that purports to be an acceptance, but includes additional or different terms, is a *counteroffer*, like at common law. Art. 19(1).
2. However, if the additional or different terms **do not materially alter** the terms of the offer, then the reply is an *acceptance*, unless the offeror, without undue delay, objects to the discrepancy. Art. 19(2).
3. In the absence of a timely objection, the terms of the contract are those in the offer plus any non-materially-altering terms in the reply. Art. 19(2).
4. Art. 19(3) identifies certain terms which are, by definition, material.

IX. Key Concept: Consideration

A. The Nature of Consideration

1. **Pre-Restatement View:** Consideration exists only where
 - a. the promisor realizes some **benefit** or
 - b. the promisee suffers some **detriment** or,
 - c. in some cases, both.
2. **Modern View (“Bargained-For” Consideration)**
 - a. To constitute consideration, the promisee’s return promise or performance must be “bargained for.” R2 § 71(1).
 - b. The promisee’s return promise or performance is “bargained for” if
 - i. the **promisor sought it** in exchange for his promise and
 - ii. the **promisee gave it** in exchange for that promise. R2 § 71(2).
 - c. Consideration may be given to or by a **third party**. R2 § 71(4).
 - d. The *Restatement (Second)* explicitly abandons the requirement of benefit to the promisor or detriment to the promisee. R2 § 79(a).
 - e. The *Restatement (Second)* also disavows the views of some courts that the consideration must have induced the promisor to make her promise and that the promisor’s promise must have **induced** the promisee or third party to give the consideration. R2 § 81.

B. Forms of Consideration: Consideration may take the form of

1. an **act**, including giving **value** (*i.e.*, money), R2 §§ 71(3)(a) & 72;
2. **forbearing** from acting, R2 § 71(3)(b);
3. **creating, modifying, or destroying** a legal **relationship, right, or duty**, R2 § 71(3)(c); or
4. a **return promise**, as long as the promised performance would be consideration, R2 § 75.
 - ◆ The fact that the promise is **voidable** or **unenforceable** as a matter of law does not prevent it from serving as consideration. R2 § 78.

C. **What is Not Consideration?**

1. **Pre-Existing Duty:** The performance of a duty already owed is not consideration as long as the obligee's pre-existing duty to performance is neither
 - a. doubtful, nor
 - b. the subject of honest dispute. R2 § 73.
2. **Release of Invalid Claim or Defense:** Forbearing to assert or surrendering an invalid claim or defense is not consideration unless
 - a. the validity of the claim or defense is doubtful due to uncertain facts or law, or
 - b. the forbearing or surrendering party genuinely believes the claim may be valid. R2 § 74.
3. **Conditional Promise**
 - a. A conditional promise is not consideration if the promisor knows, at the time she makes the promise, that the condition cannot occur. R2 § 76(1).
 - b. However, a conditional promise may constitute consideration if
 - i. the occurrence of the condition is within the promisor's control, and
 - ii. the promisor
 - a). promises that the condition will occur, or
 - b). promises to forbear from causing the condition, whichever is appropriate. R2 § 76(2).
4. **Alternative Promise:** A promise which reserves for the promisor a chance among two or more alternative performances is not consideration, unless
 - a. each alternative, standing alone, would constitute consideration, or
 - b. any alternative that would not constitute consideration could not be chosen by the promisor at the appropriate time. R2 § 77.
5. **"Illusory" Promise:** A promise the performance of which is entirely at the discretion of the promisor is not consideration. *See* R2 § 77 cmt. a.